1992

The State of Utah v. Jesus A. Sepulveda : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	920163.CA
Plaintiff/Appellee,	:	Case No. ~~910155-CA~~
v.	:	
JESUS A. SEPULVEDA,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE) WITH INTENT TO DISTRIBUTE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (Supp. 1991), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR JUAB COUNTY, STATE OF UTAH, THE HONORABLE GEORGE E. BALLIF, PRESIDING.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 910155-CA
v.	:	
JESUS A. SEPULVEDA,	:	Priority No. 2
Defendant/Appellant.	:	

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for possession of a controlled substance (cocaine) with intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1991). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (1992).

STATEMENT OF ISSUE PRESENTED AND STANDARD OF REVIEW

The sole issue on appeal is whether the trial court correctly denied defendant's motion to suppress the evidence seized in a warrantless, consensual search of defendant's vehicle. The factual findings underlying the trial court's ruling on a motion to suppress will not be disturbed on appeal unless they are clearly erroneous; however, in assessing the trial court's legal conclusions based on its factual findings, the appellate court applies a correction of error standard of review. State v. Cayer, 814 P.2d 604, 610 (Utah App. 1991). Accord United States v. Butler, 904 P.2d 1482, 1484 (10th Cir. 1990).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Jesus A. Sepulveda, was charged with possession of a controlled substance (cocaine) with the intent to distribute, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1991) (R. 2). After the trial court denied defendant's motion to suppress the evidence seized, a jury convicted defendant as charged (R. 22, 26-41, 70-74, 131).

The trial court sentenced defendant to a term of one to fifteen years in the Utah State Prison and imposed various fines and fees (R. 150). The trial court then suspended defendant's sentence and imposed a 36 month term of probation (R. 150-51).

STATEMENT OF THE FACTS

For purposes of the issue raised on appeal, the pertinent facts are those set out in the trial court's ruling denying defendant's motion to suppress (R. 70-74) (a complete copy of the court's decision is contained in addendum D). The trial court found as follows:

> From the testimony given it appears that the following facts are those testified to by the Trooper and not contested by any other witness since no one else was called by the State or the defendant.
>
> Trooper Mangelson testified that he first observed the defendant vehicle which was a Camaro (a stylish General Motor sports car) but that it had an expired Utah registration.

> Upon effecting the stop the officer asked the defendant for a driver's license and registration which the defendant was unable to produce. The defendant claimed the vehicle belonged to his friend and was being used to return to Utah since the vehicle they went to California in broke down. The defendant could not give [the] name of his friend who ow[n]ed the vehicle nor an address.
>
> The officer noted that as the conversation with defendant extended he observed the defendant reacting in a very nervous and visibly shaking manner. After being asked if the vehicle was carrying any drugs or firearms and responding [']no,['] the trooper asked if he could search the vehicle to which he said [']go ahead.[']
>
> The officer requested the passengers to exit the vehicle at which time they did and he frisked them for weapons, and found a small marijuana pipe in the pocket of a juvenile who was a passenger in the vehicle. The defendant did not have a key to the trunk[,] but got access to it for the search through use of a screw driver. While searching the vehicle the officer noted screws that had paint wear marks on them indicating some form of recent use and lead [sic] to the discovery of a compartment under the seat wherein one kilo of cocaine was retrieved.
>
> It is also noted that the testimony presented by the trooper was to the effect that a wom[a]n passenger in the subject vehicle had taken the trooper aside and indicated to him that she was an agent for the D.E.A. and that there was contraband in the car after which the officer proceeded to the discovery through the compartment under the seat to which access was obtained through use of the screwdriver on the wore [sic] screws.

(R. 70-72, see Addendum D). Based on the above findings, the trial court concluded as follows:

> The two paramounts [sic] considerations that this set of facts give rise to are whether or not there was probable cause for the stop of

the vehicle, and a subsequent search of it. There is also an issue to whether or not the defendant under the circumstances of this case had any standing to object to the officer searching the vehicle aside from the probable cause question, and lastly whether or not a consent was obtained to search the vehicle by the trooper from the defendant.

The court concludes that the facts in this case support the right of the trooper to proceed with a search of the vehicle under all of the above issues.

As to the initial stop of the vehicle, the only testimony presented indicates that there was no valid Utah registration presented for the car which showed a violation of the registration laws which justified the officer in making the stop which would not be unreasonable under the circumstances of the expired registration observed by the officer. The fact that after the stop the defendant could not produce a drivers [sic] license nor could he give any ownership information other than that it was a friend[']s car whose name he could not give nor whose address he could give would justify the officer in proceeding with additional questions which the uncontroverted testimony shows that consent was given for the vehicle search and no evidence would support a showing of the consent being coerced or in any manner otherwise unlawfully obtained.

It would appear under the totality of the circumstances after the initial stop and learning from a third party in the vehicle who was identified as a D.E.A. operative was a direct statement to the officer that there was contraband in the vehicle which occurred prior to obtaining the consent[,] or at least proceeding with the search would certainly give probable cause under exigent circumstances, the detention being on a highway some distance from a source for obtaining a search warrant would certainly give probable cause to the officer to proceed. The fact that the consent was given would clearly confirm the actions of the officer in going into areas that he deemed

> suspicious within the car in locating the contraband.
>
> Based on the foregoing analysis on the basis of evidence presented only by the trooper, there has been no showing that the search was unreasonable, and to the contrary it appears that the record shows it to be a reasonable search under the circumstances presented by this case.
>
> Defendant's motion to suppress is denied[.]

(R. 70-72, see Addendum D).

As noted in the court's ruling, defendant presented no evidence at the suppression hearing, nor did he make any legal argument before the court (Transcript of suppression hearing, October 3, 1990, [ST.] at 3-24) (a copy of the suppression hearing transcript is contained in Addendum C).

Although defendant renewed his motion to suppress at trial, he did not articulate any new grounds for suppression or otherwise argue the merits of his motion before the court and the motion was again denied (T. 43, 73).

SUMMARY OF ARGUMENT

The grounds for objection to evidence must be distinctly and specifically stated in the trial court before this Court will review those grounds on appeal. Because defendant failed to challenge the legality of his detention and the trooper's reliance on his nervous behavior in the proceedings below, he has waived consideration of these issues on appeal.

The only cognizable issue before this Court concerns the voluntariness of defendant's consent to search. However, because defendant's argument on appeal is devoid of relevant

legal or factual analysis, does not identify any error by the court below, and neglects to outline the issue with sufficient specificity to allow the State to respond, his argument does not merit review.

Additionally, the trial court found that defendant lacked standing to contest the vehicle search. Defendant does not challenge this finding on appeal. Thus, even if this Court were to look past defendant's waiver of these issues, he lacks standing to complain of the vehicle search.

ARGUMENT

POINT I

DEFENDANT'S FAILURE TO ARTICULATE ANY ARGUMENT CONCERNING THE LEGALITY OF HIS DETENTION AND THE TROOPER'S RELIANCE ON HIS NERVOUS DEMEANOR IN THE TRIAL COURT CONSTITUTES A WAIVER OF THESE ISSUES ON APPEAL

In Point I of his brief defendant argues that his state constitutional rights[1] were violated because the trooper lacked "reasonable suspicion to detain him or subsequently search his vehicle" (Br. of App. at 5). In Point II of his brief defendant argues that his nervous behavior during the stop did not create probable cause or reasonable suspicion to justify his detention

---

[1] Defendant's reliance on state constitutional provisions, both in the trial court and in Point I of his brief on appeal, is nominal and lacks any argument as to why this Court should engage in a separate state constitutional analysis. See R. 40 (Addendum #); Br. of App. at 5. Thus, this Court need not analyze defendant's arguments under state constitutional provisions. State v. Marshall, 791 P.2d 880, 883 n.4 (Utah App.), cert. denied, 800 P.2d 1105 (Utah 1990); State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988).

or the search of his vehicle (Br. of App. at 7-8). However, defendant failed to articulate these particular arguments in the trial court and has thus failed to preserve them for review.

Absent special justification for failing to present all available grounds in support of a suppression motion, this Court will not rule on those grounds not addressed in the trial court. State v. Price, 827 P.2d 247, 248 n.2 (Utah App. 1992); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1992); State v. Carter, 707 P.2d 656, 660-61 (Utah 1985). The law recited by defendant in Points I-II of his brief on appeal was available for presentation to the lower court. The record fails to indicate any reason for defendant's failure to raise these arguments.

At the suppression hearing, defendant cross-examined Trooper Mangelson, but failed to pinpoint any issue or present any argument to the court regarding his detention or nervousness (ST. 3-24, see Addendum C). Moreover, defendant did not address either of these issues in his written motion to suppress, or in his supporting memorandum (R. 22, 26-41) (copies of defendant's motion to suppress and supporting memorandum are contained in Addendums A and B). Rather, defendant argued that the evidence should be suppressed because the warrantless search was conducted without probable cause or consent in violation of his constitutional rights (R. 22-23, 29-40, see Addendums A and B). Although defendant renewed his motion to suppress at trial, he again failed to pinpoint any issue or present any argument to the court (T. 43, 73). Because defendant failed to raise these

particular issues before the trial court, the court made no determination thereon, and defendant has waived them for consideration on appeal. Price, 827 P.2d at 248; Archambeau, 820 P.2d at 922; Carter, 707 P.2d at 660-61.

POINT II

DEFENDANT'S FAILURE TO PROVIDE CITATION AND ANALYSIS OF RELEVANT AUTHORITY AND FACTS PRECLUDES APPELLATE REVIEW OF THE VOLUNTARINESS OF HIS CONSENT TO SEARCH

In Point III of his brief defendant asserts that his consent to search was both involuntary and resulted from the trooper's exploitation of the alleged illegal detention (Br. of App. 9-10). However, as demonstrated in Point I of this brief, defendant failed to articulate any argument concerning the legality of his detention in the trial court. Rather, defendant argued that he did not consent to the vehicle search or, alternatively, that his consent was involuntary (R. 22, 26-41, see Addendums A and B). Thus, defendant's assertion on appeal that his consent was obtained through the trooper's exploitation of the alleged prior illegal detention has not been preserved for review. State v. Price, 827 P.2d 247, 248 (Utah App. 1992); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991); State v. Carter, 707 P.2d 656, 660-61 (Utah 1985).

The only cognizable issue before this Court concerns the voluntariness of defendant's consent to search. However, defendant's argument on appeal consists merely of a legal citation concerning the state's burden for proving voluntary consent and a rhetorical statement questioning the intelligent

nature of his consent (Br. of App. 9-10). His argument is otherwise devoid of relevant legal or factual analysis, and is thus meaningless. The Rules of Appellate Procedure require that a brief on appeal include an argument which "shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). Because defendant's argument fails to comply with the briefing rule, lacks any meaningful analysis, does not identify any error by the court below, and neglects to outline the issue with sufficient specificity to allow the State to respond, his argument does not merit review. Price, 827 P.2d at 248-50; State v. Day, 815 P.2d 1345, 1351 (Utah App. 1991); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984).

Additionally, the trial court found that defendant lacked standing to contest the vehicle search (R. 72, see Addendum D). Defendant does not challenge this finding on appeal (Br. of App. at 5-10). Thus, even if this Court were to look past defendant's waiver, he lacks standing to complain of the vehicle search. State v. Atwood, 186 Utah Adv. Rep. 33, 34 n.1 (Utah App. May 12, 1992) (proponent of a motion to suppress has the burden of establishing that his own constitutional rights were violated by the challenged search and seizure).

CONCLUSION

Defendant's conviction for possession of a controlled substance (cocaine) with intent to distribute should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of June, 1992.

R. PAUL VAN DAM
Attorney General

Marian Decker

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Milton T. Harmon, attorney for appellant, P.O. Box 97, Nephi, Utah 84648, this 29th day of June, 1992.

Marian Decker

ADDENDA

ADDENDUM A

MILTON T. HARMON #1373
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P.O. Box 97
Nephi, Utah 84648
Telephone: (801) 623-1802

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	Case No. 396-D
Plaintiff,	:	
vs.	:	MOTION TO SUPPRESS EVIDENCE
JESUS A. SEPULVEDA,	:	
Defendant.	:	Judge _____

Comes now the Defendant and moves the above-entitled court to suppress evidence seized in the search of the vehicle in which the Defendant was riding at the time of his arrest.

This motion is made for the reason that the State alleges that a search of the subject vehicle was made with the consent of the Defendant. That, in reviewing the matter with the Defendant, he

has advised counsel that he did not give such consent, nor did the officer have probable cause to search the vehicle.

Therefore, the Defendant requests that hearing be had upon this motion to determine if appropriate consent was given and, if there was no consent given, that all evidence seized in the search of the vehicle be suppressed and not be admitted as evidence in any proceeding hereafter.

DATED this 31 day of March, 1990.

MILTON T. HARMON
Attorney for the Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Motion to Suppress Evidence to: Mr. Donald J. Eyre, Jr., Juab County Attorney, 125 North Main Street, Nephi, UT 84648 and Mr. Jesus A. Sepulveda, 1146 South 500 East, Apt. #4, Salt Lake City, UT 84102; first-class postage prepaid, this 31 day of March, 1990.

Debbie Robinson

ADDENDUM B

MILTON T. HARMON #1373
Attorney for the Defendant
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Telephone: (801) 623-1802

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	Criminal No. 296-D
Plaintiff,	:	
vs.	:	DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS
JESUS A. SEPULVEDA,	:	
Defendant.	:	Judge George E. Ballif

Comes now the defendant and submits the following Memorandum in support of his Motion To Suppress:

STATEMENT OF FACTS:

1. The defendant, while traveling on I-15 near Nephi, Utah, on January 30, 1990, was stopped by officer Paul Mangelson, of the Utah Highway Patrol. The vehicle driven by the defendant was in all respects, being operated in an appropriate and legal manner. But the vehicle registration was good only through the month of

December, 1990. The expired registration was the ostensible reason for the stop. Although, officer Mangelson did testify that based upon his extensive experience in drug interdiction, the defendant, and the car in which he was traveling did meet a "loose" drug courier profile, i.e. sporty general motors car, (Camero) traveling in a northerly direction on I-15, and driven by persons of Spanish-Mexican origin, and that this profile caused his initial suspicion.

2. The defendant, as the officer observed when he began to converse with him, spoke Spanish. The defendant speaks Spanish as his primary language, and can speak and understand a "little" English.

3. After an initial inquiry about drivers license, registration, and destination, defendant was directed to exit the vehicle. The officer indicates that there was a discussion about the vehicle owner. The defendant had borrowed the vehicle for a trip from California to Utah.

4. As the officer conversed with the defendant, he noted he was visibly shaking. The officer obviously attributed this conduct to the defendant's wrongdoing, ignoring an obvious response of the

defendant to the cold weather. The officer had the car occupants exit the vehicle and began a search.

5. At this point the officer became suspicious and determined to conduct an investigatory search and inquiry. He suspected, because of the loose profile, as recited above, the defendant's shaking, and disturbed paint on the screw head which secured the seat back, and his prior experience with similar vehicles containing drugs in the vent area, that the defendant was transporting illegal drugs.

6. The officer then said he asked for permission to search (to look into) the vehicle. His recollection is that permission was given by words as "go ahead". The officer testified, he then asked the defendant to step from the vehicle. The vehicle was in part dismantled by the seat back cover being removed. Cocaine was discovered in the area.

7. The officer testified that the defendant did not entirely understand the officer during the course of these events, and had to rely in part upon a passenger, who as it turns out was a state law enforcement agent, interpreting for him. The defendant denies

that he was asked for, or gave permission, to search or look into the vehicle.

ISSUES:

The primary issue of the legality of the search and seizure, all done without a warrant. In the absence of a warrant the State must rely upon A. Probable cause, or B. Consent. The defendants contend that neither circumstance is present, thus the search and seizure were not proper and the result should be suppression of the cocaine as evidenced in the criminal prosecution. These issues will be addressed in the above Order.

A. Was there probable cause to allow a search and seizure without a warrant?

1. It is well settled under Utah law that the determination of probable cause requires a close examination of facts in each individual case State v. Earl 716 P.2d 803 (Utah 1986).

2. The facts in this case upon which the State can rely to constitute probable cause are as follows:

a. The subject car was a sporty general motors car.

c. The car was traveling in a northerly direction on Interstate Highway 15.

d. The defendant, clad in a T-shirt, was shaking when exposed to the cold January temperatures.

e. The seat back cover on the driver's side was fastened with a screw, and the paint on this screw head had been disturbed.

f. The investigating officer had prior experience with general motors cars being driven on I-15 where drugs were located in the area of the seat back.

g. The occupants of the vehicle were of Spanish-Mexican origin.

3. It must certainly be admitted that any one of the above factors, standing alone, would not constitute probable cause. This is for the reason that each listed item is a perfectly legal act. The next question is, do these facts, by reason of their combination, constitute probable cause. The defendant asserts that they

do not. There is nothing unique about these set of facts that would indicate probable cause. The conclusion is based upon an analysis of cases where the Utah Courts have found probable cause. Briefly, in all such cases there had been some sign of an independent illegal act, such as an odor of marijuana, or visible drug paraphernalia. See the following instructive cases where probable cause has been found:

State v. Earl, supra. these facts were found to exist. 1. Strong odor of marijuana coming from the interior of the vehicle. 2. Defendants were driving a rental car after flying to Arizona from Utah, suggesting he was a drug courier. 3. Strong air fresheners. 4. A loaded firearm, readily accessible to the defendants. 5. A quantity of controlled substances and paraphernalia were found in the vehicle when it was stopped. 6. The defendants told the officer that additional marijuana was probably located in the car. All of these objective facts were known to the officer prior to the search being conducted. And the court found that they constituted probable cause.

State v. Dorsey 731 P.2d 1085 (Utah 1986), where the court found objective facts to justify the ultimate conclusion that there was probable cause: 1. The officers were attempting to make a controlled buy of a large quantity of cocaine. 2. The suppliers had cocaine in the LaQuinta Motel in rooms 131 and 137. 3. That someone involved in the transaction was wearing a dark leather jacket. 4. That someone wearing a dark leather jacket was seen in the motel parking lot carrying a bag and behaving suspiciously. 5. That after the deal was called off, the persons in room 131 and 137 left the motel. One wearing a dark leather jacket. 6. That these two persons walked from the motel directly to a silver truck with license plates containing the numbers 3535. The officer stopped this truck and conducted a search where cocaine was found.

Other cases could be cited but the above cases are excellent for the general example given. And based upon this example defendants contend that the factors available to the officer in the case now before the court do not rise to the basis for probable cause.

B. Was there a valid consent to search and seize?

1. There is a conflict in the testimony regarding consent. The officer said consent was received. The defendant denies that he gave consent. This may be explained by the language used by the defendant. The officer spoke in English and did not understand Spanish. The defendant, spoke fluently in Spanish, and a little in English.

2. With these circumstances in mind, let us look at some legal interpretation and guidelines regarding consent to search a vehicle:

3. In Schneckloth v. Bustamonte, 412 U. S. 218 (1973), the United States Supreme Court examined the "consent exception" to the warrant requirement of the Fourth Amendment. In that case, the court noted that one of the well-established exceptions to the warrant and probable cause requirements of the Fourth Amendment is a search conducted pursuant to voluntary consent. The question dealt with was what must the prosecution prove to demonstrate that a consent was "voluntarily" given.

4. The court rejected the defendant's argument that the "voluntariness" required for a consent to search should be the same as the voluntariness showing required in a police interrogation, i.e. miranda warning and waiver of rights. The court however stated that any coercion, explicit or implicit, would negate a voluntary consent. In making such proof the government need not show that the person had been specifically warned of his right to refuse to a consent to a search. The court also rejected the defendant's claim that the consent to search was like a waiver of a constitutional right at a criminal trial. It was stated that the test to be applied is the traditional test of voluntariness. That is the prosecution has the burden of proof to show that the consent was freely and voluntarily given and was not the result of duress or coercion. Voluntariness, it was held, is a question of fact to be determined from all the circumstances.

5. The court then discussed some of the factors to be considered when applying this totality of the circumstances test. These include; the defendant's intelligence, whether or not the defendant was in custody, the nature of the police questioning and

the environment in which it took place, the defendant's knowledge of his right to withhold consent, and any other circumstances that weigh on the issue of voluntariness.

6. This issue of coercion as it relates to a consent to search has also been addressed by the Supreme Court in other contexts.

7. In Florida v. Royer, 460 U. S. 491 (1983), it was held that a stop of an individual on less than probable cause cannot justify a detention in a small room by two police officers. The officers had retained the defendant's airline ticket and identification. They then had his luggage brought to the room where he was held. The court found that such a situation would result in the defendant's belief that he was under arrest. Because the defendant had not been informed that he was free to board his plane and he actually believed he was being detained, it was held that the encounter had lost its consensual nature. The court went on to hold that, as a practical matter, Royer was under arrest. Since there was no probable cause to arrest him, the search was illegal,

and the evidence was ordered suppressed. The court then made some observations about the nature of searches based on consent:

> ". . . where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."

8. The Court Of Appeals for the Tenth Circuit addressed a similar issue in United States v. Racalde, 761 F.2d 1448 (10th Cir. 1985). In that case, the defendant had been stopped for speeding in New Mexico. He produced a Virginia driver's license. The car was not registered to the defendant. The officer ran an NCIC check to determine if the vehicle had been reported as stolen. That check was negative. He then requested assistance from a backup officer stating that he had a "gut instinct" that the defendant was transporting narcotics. The officer returned to the defendant's car and told Recalde he could either plead not guilty or sign the ticket. When it was signed, the officer asked the defendant to step out of the car and then requested to inspect the trunk. During the inspection, the officer found that some of the screws

in the molding had been tampered with. The officer then requested that the defendant accompany him to a nearby town which the defendant agreed to do. At no time had the officer returned the defendant's driver's license, the vehicle registration, or the traffic ticket. At the police station the defendant consented to the search of the car.

9. In analyzing the issue of whether the search was made with the defendant's consent, the Tenth Circuit employed a three tier analysis. It was described as follows:

> "First, there must be clear and positive testimony that the consent was unequivocal and specific. Second, the government must establish that the consent was given without duress or coercion. Finally, we evaluate those first two standards with a traditional indulgence of the courts against a presumption of waiver of constitutional rights." at 1453.

10. In determining the issue of duress or coercion in obtaining consent to search, the Supreme Court Of Utah has described a number of factors that should be considered. In State v. Whittenback. 621 P.2d 103 (Utah 1980), the court stated:

> "Clearly the prosecution has the burden of establishing from the totality of the circumstances that the consent was voluntary

> given; however, the prosecution is not required to prove that defendant knew of his right to refuse. Factors which may show a lack of duress or coercion include: 1) The absence of a claim of authority to search by the officers: 2) The absence of an exhibition of force by the officers; 3) A mere request to search; 4) Cooperation by the owner of the vehicle; and 5) The absence of deception or trick on the part of the officer." [Footnote omitted] at 106.

11. Several other Utah cases have held that the question regarding a Fourth Amendment violation turns on the issue of reasonableness. State v. White, 577 P.2d 552 (Utah 1978); State v. Kelsey, 532 P.2d 1001 (Utah 1975); State v. Kaae, 30 Ut. 2d 73, 513 P.2d 435 (Utah 1973). Under the test, courts are to balance the interests of society against that of the individual. The court would typically describe this test as follows:

> "In regard to the propriety of the search; it is to be had in mind that the constitutional protections are only against unreasonable searches. The test to be applied is whether under all of the circumstances, fair-minded persons, giving due consideration to the rights and interest of the public, as well as to those of the suspect, would judge the search to be an unreasonable intrusion into the latter's rights. A further important observation is that the just-stated test to gauge the validity of a search without a

> warrant is satisfied if consent is given to the search, as was done here; and that these rules apply even when the suspect is in custody." [Footnotes omitted] State v. White, supra, at 553-554.

However, in State v. Griffin, 626 P.2d 478 (Utah 1981), three of the justices expressly rejected the White holding, as it failed to comport with the requirements of the United States Supreme Court's rulings on the Fourth Amendment. The majority of the court adopted the standard that searches not made pursuant to a valid warrant were per se unreasonable, and subject to the sell delineated exceptions.

12. In the present case there is conflicting evidence on the issue of whether or not the defendant voluntarily consented to the search. This evidence must be weighed in light of the presumption against waiver of a constitutional right. Furthermore, as previously described, the state bears the burden of proving that there was in fact a voluntary consent to the search of the car.

13. The final point to be considered regarding consent relates to the extent of the consent, or the area to which consent would relate, if there were in fact consent. In respect to this

matter, the defendants represent that if the court should find that there was a consent, that consent was just to look into the vehicle, and would not extend to an examination of the vehicle by removing mechanically fastened vent covers, the turning of screws, etc. See State v. Marshall, Utah Court Of Appeals, case number 890121-CA, filed December 26, 1989. A copy of this Opinion is attached hereto

CONCLUSION:

Based upon the facts of this case, a reasonable interpretation of the law, the cocaine seized from the seat back compartment should be suppressed for the reason that the search and seizure were conducted without a warrant, in violation of the defendants Federal, State and Constitutional rights, and that the State has not met its burden to show beyond a reasonable doubt that an exception to the warrant requirement existed.

Respectfully submitted this 9TH day of October, 1990.

MILTON T. HARMON
Attorney For The Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Defendants Memorandum In Support Of Motion To Suppress to: Mr. Jesus A. Sepulveda, c/o Eunice Diaz, 217 South Foss Street, Apt. #28, Salt Lake City, UT 84104 and to Mr. Donald J. Eyre, Jr., Juab County Attorney, 125 North Main Street, Nephi, UT 84648; first-class postage prepaid, this 9th day of October, 1990.

Debbie Robinson

IN THE UTAH COURT OF APPEALS

----ooOoo----

The State of Utah, Plaintiff and Respondent,	)	OPINION (For Publication)
v.	)	Case No. 890121-CA
Gregory Marshall, Defendant and Appellant.	)	

Petition for Interlocutory Appeal
Seventh District, Sevier County
The Honorable Don V. Tibbs

Attorneys: Jerold D. McPhee and Kristine K. Smith, Salt Lake City, for Appellant
R. Paul Van Dam and Christine F. Soltis, Salt Lake City, for Respondent

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Before Judges Davidson, Billings, and Jackson.

BILLINGS, Judge:

The appellant, Gregory J. Marshall ("Mr. Marshall"), was charged with possession of a controlled substance with the intent to distribute for value, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1989). Mr. Marshall filed a pre-trial motion to suppress the 140 pounds of marijuana seized from the rental car he was driving when he was arrested. The trial court denied Mr. Marshall's motion and he filed this interlocutory appeal. We reverse.

We recite the facts surrounding the seizure of the contraband in detail as the legal issues presented are fact sensitive. State v. Sierra, 754 P.2d 972, 973 (Utah Ct. App. 1988). Utah Highway Patrol Trooper Denis Avery ("Trooper Avery") was driving on Interstate 70 near Salina, Utah. He noticed Mr. Marshall's vehicle in the left-hand lane passing a motor home. Trooper Avery observed that Mr. Marshall's turn signal remained blinking for approximately two miles after he passed the motor home. Not knowing whether Mr. Marshall's signal was malfunctioning or whether Mr. Marshall had negligently left the signal on, Trooper

Avery pulled the vehicle over to inform Mr. Marshall of the problem and to give him a warning ticket. Trooper Avery had issued similar warning citations for turn signal violations approximately five to ten times in the previous six-month period.

Prior to stopping Mr. Marshall, Trooper Avery noticed the vehicle had California license plates. He approached Mr. Marshall's vehicle and informed Mr. Marshall of the turn signal problem. Mr. Marshall responded that he had been having "a hard time keeping the thing turned off."

Trooper Avery asked Mr. Marshall for his driver's license and vehicle registration. Mr. Marshall produced a New York driver's license and a California rental agreement for the vehicle. Mr. Marshall said he was going skiing in Denver and planned to return the car to San Diego, California. However, the rental agreement indicated that the car would be returned in New York in five days.

Trooper Avery acknowledged he became suspicious that Mr. Marshall might be transporting drugs. Trooper Avery asked Mr. Marshall to return with him to his patrol car where he issued a warning citation for "Lights, head, tail, other." Trooper Avery then returned Mr. Marshall's driver's license and the rental agreement.

Trooper Avery next asked Mr. Marshall if he was carrying alcohol, drugs or firearms. Mr. Marshall stated he was not. Trooper Avery then asked Mr. Marshall if he could "look inside the vehicle." Mr. Marshall responded, "Go ahead." Trooper Avery and Mr. Marshall walked back to Mr. Marshall's vehicle. The passenger door was locked and Mr. Marshall reached in on the driver's side to open the door. Trooper Avery noticed a small red bag on the floor of the vehicle and asked if he could open it. Mr. Marshall agreed. No contraband was found inside the bag or the passenger compartment of the vehicle.

Trooper Avery then asked if Mr. Marshall had a key to the trunk and if Mr. Marshall would open the trunk. Mr. Marshall attempted to open the trunk, but was shaking so badly that Trooper Avery had to assist him by holding the key latch cover up while Mr. Marshall inserted the key. Trooper Avery saw four padlocked suitcases when Mr. Marshall opened the trunk. Trooper Avery asked Mr. Marshall what the suitcases contained and Mr. Marshall responded "clothes." Trooper Avery then asked if he could look in the suitcases. Mr. Marshall immediately reversed his statement and responded that the suitcases were not his and must have already been in the trunk when he rented the vehicle. Trooper Avery testified there was some play in the zipper of one bag and he unzipped it far enough to see a green leafy substance. Trooper Avery then arrested Mr. Marshall for possession of a controlled substance.

Mr. Marshall did not testify or present any evidence to contradict Trooper Avery's testimony during the hearing below.

STANDARD OF REVIEW

"[W]e will not disturb the trial court's factual evaluation underlying its decision to grant or deny a motion to suppress unless it is clearly erroneous." State v. Sierra, 754 P.2d 972, 974 (Utah Ct. App. 1988). See also State v. Walker, 743 P.2d 191, 193 (Utah 1987); State v. Johnson, 771 P.2d 326, 327 (Utah Ct. App. 1989). Further, "[t]he trial court's finding is clearly erroneous only if it is against the clear weight of the evidence or if [the appellate court] reach[es] a definite and firm conviction that a mistake has been made." State v. Sery, 758 P.2d 935, 942 (Utah Ct. App. 1988).

STANDING--EXPECTATION OF PRIVACY

The state argues that we need not reach the issues asserted by Mr. Marshall that Trooper Avery's stop of Mr. Marshall was an unconstitutional pretext, or that his consequent detention exceeded constitutional limits, or that Mr. Marshall did not voluntarily consent to the search of the suitcases found in the trunk of his rental car. As a threshold argument, the state claims that Mr. Marshall lacks standing to challenge the seizure of the suitcases as he disclaimed any ownership or possessory interest in the suitcases both during the search and subsequent to his arrest and, thus, had no expectation of privacy in their contents.[1] See Rakas v. Illinois, 439 U.S. 128, 138-50 (1978); State v. Valdez, 689 P.2d 1334, 1335 (Utah 1984); State v. Grueber, 776 P.2d 70, 73-75 (Utah Ct. App. 1989); State v. DeAlo, 748 P.2d 194, 196-97 (Utah Ct. App. 1987).

The fatal problem with the state's argument is the state raises standing for the first time on appeal. The Utah Supreme

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1. The state relies upon the following testimony from the preliminary hearing:

> Q. And what was inside the trunk?
>
> A. There were four suitcases.
>
> Q. Did you ask if you could look in those suitcases?
>
> A. Uh huh (affirmative). First of all, I asked him what was in the suitcases, and he told me, right quickly, clothes. Then when I looked at him again, he told me that he didn't know where they came from, they must have been in there when he rented the car.

Court recently squarely held that standing to challenge the validity of a search under the fourth amendment "is not a jurisdictional doctrine [but] is a substantive doctrine that identifies those who may assert rights against unlawful searches and seizures." State v. Schlosser, 774 P.2d 1132, 1138 (Utah 1989). Citing the general rule that a substantive issue or "claim of error cannot be raised for the first time on appeal," the court deemed the issue of standing waived. Id. at 1138-39.

The state attempts to distinguish Schlosser, claiming that in Schlosser the state not only failed to raise the issue of standing in the motion to suppress hearing, but also on appeal. We do not find the distinction determinative. We believe the Schlosser standing rule was fashioned to protect the defendant from being required to deal with new legal issues on appeal when he had no warning of the necessity to develop the relevant facts below.

In this case, the state, the defendant, and the trial court all focused on the issue of voluntary consent to search the suitcases, not standing to assert a privacy interest in the suitcases. The defendant may well have chosen to testify at the motion to suppress hearing to contradict the trooper's testimony that he had disclaimed ownership of the suitcases had the state chosen to litigate the issue of standing below.

In Steagald v. United States, 451 U.S. 204 (1981), the United States Supreme Court also refused to allow the government to raise the issue of fourth amendment standing for the first time on appeal. The Court refused to allow the state to claim that the defendant had no expectation of privacy in the house searched as a ground for sustaining the lower court's ruling denying a motion to suppress when the state had not made this claim at trial. The Court concluded:

> The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.

Id. at 209.

Thus, we conclude that the state may not for the first time on appeal claim that Mr. Marshall lacks standing to assert a privacy interest in the contraband seized to uphold the trial court's denial of the motion to suppress.[2]

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2. Our conclusion may seem at odds with the general rule that we "may affirm the trial court's decision on any proper grounds, even though the trial court assigned another reason for its ruling." State v. Bryan, 709 P.2d 257, 260 (Utah 1985). We agree with the general rule, but find the issue of fourth amendment standing to be unique. Fourth amendment standing involves more than simply applying another legal principle to sustain an evidentiary ruling. The failure to raise a fourth amendment standing claim is more analogous to the failure to plead and try an affirmative defense or an attempt to assert a new theory of recovery for the first time on appeal. See Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983) ("It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal."); State v. Johnson, 771 P.2d 326, 327-28 (Utah Ct. App. 1989) (defendant cannot raise constitutional issues for first time on appeal); Sampson v. Richins, 770 P.2d 998, 1005 (Utah Ct. App. 1989) (defendant cannot raise affirmative defense for first time on appeal); James v. Preston, 746 P.2d 799, 801 (Utah Ct. App. 1987) ("matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal."); Conder v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 637 n.2 (Utah Ct. App. 1987) (matters not presented to trial court prior to summary judgment cannot be raised for first time on appeal). The state asserts fourth amendment standing to validate what otherwise would be an unconstitutional search. The defendant must have an opportunity to factually meet this defense to an unconstitutional search.

Furthermore, although the Utah Supreme Court applied the waiver of fourth amendment standing rule to uphold the trial court's granting of a motion to suppress in Schlosser, the court relied on State v. Goodman, 42 Wash. App. 331, 711 P.2d 1057 (1985), which held the state could not raise the issue of standing for the first time on appeal to provide an alternative ground for sustaining the trial court's denial of a motion to suppress. Id. at 1060.

PRETEXT STOP

Initially, Mr. Marshall contends Trooper Avery used the fact that his turn signal was malfunctioning as a pretext to stop his vehicle to search for evidence of drug trafficking.

The protective shield of the fourth amendment applies when an officer stops an automobile on the highway and detains its occupants. State v. Sierra, 754 P.2d 972, 975 (Utah Ct. App. 1988). A police officer may constitutionally stop a citizen on two alternative grounds. First, the stop "could be based on specific, articulable facts which, together with rational inferences drawn from those facts, would lead a reasonable person to conclude [defendant] had committed or was about to commit a crime." Id. (citing Terry v. Ohio, 392 U.S. 1, 21 (1968); State v. Christensen, 676 P.2d 408, 412 (Utah 1984); State v. Trujillo, 739 P.2d 85, 88 (Utah Ct. App. 1987)). Second, the police officer can "stop an automobile for a traffic violation committed in the officer's presence." Sierra, 754 P.2d at 977. However, an officer may not use a traffic violation stop as a pretext to search for evidence of a more serious crime. Id.

To determine if Trooper Avery stopped Mr. Marshall's vehicle to investigate his hunch that Mr. Marshall's vehicle was involved in drug trafficking, we determine whether a hypothetical reasonable officer, in view of the totality of the circumstances confronting him or her, would have stopped Mr. Marshall to issue a warning for failing to terminate a turn signal. Id. at 978.

Mr. Marshall claims Trooper Avery's stop of his vehicle is similar to the stop we found unconstitutional in Sierra. We disagree. In Sierra, the basis articulated for the stop was that the driver remained in the left lane too long after passing a car. In this case, Trooper Avery perceived an equipment problem with Mr. Marshall's car. Either his turn signal was malfunctioning or he had negligently failed to turn it off.[3] Courts consistently have held that a police officer can stop a

3. While the warning citation does not specify which provision of the Utah Code Mr. Marshall violated, the state asserts that his conduct was in violation of Utah Code Ann. § 41-6-117(1) (1988) which, with our emphasis, provides:

car when he or she believes the car's safety equipment is not functioning properly.[4]

Furthermore, unlike the officer in Sierra, Trooper Avery was not suspicious of Mr. Marshall for other reasons before the stop, had not followed him in order to find some reason to pull him over, and, before the alleged violation occurred, had not radioed for help thereby indicating he intended to stop the vehicle.

In conclusion, we find Trooper Avery's stop of Mr. Marshall's vehicle was not a pretext, but was a valid exercise of police authority to make certain Mr. Marshall's vehicle was functioning properly.

(Footnote 3 continued)

> It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment . . . .

4. In Delaware v. Prouse, 440 U.S. 648, 660-61 (1979), the United States Supreme Court stated that an officer has a duty in the interest of highway safety to stop vehicles for safety reasons. "Many violations of minimum vehicle-safety requirements are observable, and something can be done about them by the observing officer, directly and immediately." Id. at 660. The Court inferred that as long as an officer suspects the driver is violating "any one of the multitude of applicable traffic and equipment regulations," the police officer may legally stop the vehicle. Id. at 661. See Townsel v. State, 763 P.2d 1353, 1355 (Alaska Ct. App. 1988) (court held stop justified when vehicle's headlight was out, a tail light was broken, the license plate and windows were obscured, and speeding); State v. Puig, 112 Ariz. 519, 544 P.2d 201, 202 (1975) (suspicion of defective turn signals justified stop); State v. Fuller, 556 A.2d 224, 224 (Me. 1989) (stop justified when blinking headlights led officer to stop vehicle for safety reasons).

UNREASONABLE DETENTION

Next, Mr. Marshall complains generally that the extent of his detention and the scope of Trooper Avery's investigation exceeded constitutional limits.[5] Again, we disagree.

Once a driver is lawfully stopped, an officer may inquire as to information about the driver and the vehicle "reasonably related in scope to the justification" for the detention. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (quoting Terry v. Ohio, 392 U.S. 1, 29 (1968)).

The United States Supreme Court has not chosen to define a bright-line rule as to the acceptable length of a detention because "common sense and ordinary human experience must govern over rigid criteria." United States v. Sharpe, 470 U.S. 675, 685 (1985). The Court has chosen to focus, not on the length of the detention alone, but on "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Id. at 686.

In Sharpe, the Court found that a twenty-minute detention after a highway stop for suspected drug trafficking was not excessive where the officer examined the driver's license, examined his ownership papers, requested and was denied permission to search the camper, and then stepped on the rear bumper, noting that it did not move, thus confirming his suspicion that it was overloaded. Id. at 687. The Court distinguished this reasonable detention from those involved in Dunaway v. New York, 442 U.S. 200 (1979); Florida v. Royer, 460 U.S. 491 (1983); and United States v. Place, 462 U.S. 696 (1983), stating that it was not the length of detention, but the events which occurred during the detention which transformed the

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5. We do not analyze this issue under article I, section 14 of the Utah Constitution as the state constitutional issue was not sufficiently particularized below nor is a reasoned analysis provided on appeal as to why our analysis should be different under Utah's constitution. See State v. Johnson, 771 P.2d 326, 327-28 (Utah Ct. App. 1989).

investigative stops in these cases into a "defacto arrest." Id. at 683-86.[6]

Trooper Avery wrote out the warning citation within ten minutes of stopping Mr. Marshall. Based upon the facts obtained during routine questioning and issuing the warning citation, the officer became suspicious that Mr. Marshall was involved in transporting drugs. He returned Mr. Marshall's driver's license, the car rental agreement and the citation. Trooper Avery then asked Mr. Marshall if he was carrying weapons, alcohol, or drugs in the vehicle. Mr. Marshall responded he was not. Then Trooper Avery immediately asked for permission to look into the vehicle and received Mr. Marshall's consent.

We find that Trooper Avery's initial investigation was within the scope of his traffic stop and that Trooper Avery's immediate request to search the vehicle and his expeditious completion of the search did not constitute an unreasonable detention. Furthermore, Mr. Marshall was not moved to another location nor treated in a manner to support a finding of a "defacto arrest."

CONSENT

Finally, Mr. Marshall argues that even if his initial stop and subsequent detention were not constitutionally deficient, the subsequent search of the suitcases found in the trunk of the vehicle without a warrant violated his fourth amendment rights. The state contends, on the other hand, that Mr. Marshall consented to the search of the suitcases and thus Trooper Avery's

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6. Dunaway v. New York, 442 U.S. 200 (1979) (defendant taken from neighbor's home, transported unwillingly to police station, was subjected to custodial interrogation for one hour until he made incriminating statements); Florida v. Royer, 460 U.S. 491 (1983) (defendant stopped at airport, his luggage seized, then he was taken to a small room where he was questioned and his luggage inspected); United States v. Place, 462 U.S. 696 (1983) (defendant stopped at airport, his luggage seized for 90 minutes to take it to narcotics detection dog for "sniff test," police knew of arrival time and should have had the dog on hand).

search of the suitcases and subsequent seizure of the marijuana without a search warrant was constitutionally permissible.[7]

A search is valid under the fourth amendment if it is conducted as a result of the defendant's voluntary consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); State v. Sierra, 754 P.2d 972, 980 (Utah Ct. App. 1988). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Schneckloth, 412 U.S. at 227. "A trial court's finding of voluntary consent will not be reversed unless it is clearly erroneous." United States v. Miller, 589 F.2d 1117, 1130 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).

In United States v. Abbott, 546 F.2d 883 (10th Cir. 1977), the Tenth Circuit outlined the specifics necessary for the government to sustain its burden to show that voluntary consent was given:

> (1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

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7. The state does not argue that Trooper Avery had probable cause to search either the car or the suitcases. We, therefore, need not deal with the troublesome issue of whether probable cause to search an automobile is sufficient under the automobile exception to search a locked suitcase found in the trunk of a car. See, e.g., United States v. Ross, 456 U.S. 798 (1982) (if probable cause exists, police can search closed containers found in vehicle); Arkansas v. Sanders, 442 U.S. 753 (1979) (warrantless search of a suitcase found in the trunk of a taxi invalid); United States v. Chadwick, 433 U.S. 1 (1977) (warrantless search of a footlocker found in the trunk of a vehicle invalid); State v. Hygh, 711 P.2d 264, 272 n.1 (Utah 1985) (Zimmerman, J., concurring separately) (criticizing the Ross holding).

Id. at 885 (quoting Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962)). See also United States v. Recalde, 761 F.2d 1448, 1453 (10th Cir. 1985). See generally State v. Whittenback, 621 P.2d 103, 106 (Utah 1980); State v. Sierra, 754 P.2d 972, 980-81 (Utah Ct. App. 1988).

Even when a defendant voluntarily consents to a search, the ensuing search must be limited in scope to only the specific area agreed to by defendant. "The scope of a consent search is limited by the breadth of the actual consent itself. . . . Any police activity that transcends the actual scope of the consent given encroaches on the Fourth Amendment rights of the suspect." United States v. Gay, 774 F.2d 368, 377 (10th Cir. 1985); see, e.g., People v. Thiret, 685 P.2d 193, 201 (Colo. 1984) (scope of consent exceeded when police asked to "look around" the house, then conducted a 45-minute search of rooms, drawers, boxes and closed containers).

The trial court made the following finding on the issue of Mr. Marshall's consent: "The Defendant consented to the search. There was no evidence of duress or coercion." This conclusory finding on consent is not particularly helpful in determining whether Mr. Marshall's consent was "unequivocal and specific" as it does not detail what Mr. Marshall agreed could be searched--the interior of the passenger compartment, the trunk, or the locked suitcases. The relevant portions from the transcript of Trooper Avery's testimony are more enlightening:

> Q. What were the words he [sic] used when you asked him to search his vehicle?
>
> . . . .
>
> A. I asked Mr. Marshall if--if there were any--if there was any--were there any drugs in the vehicle, and he took two or three seconds--no, wait a minute, I guess--I first asked him if he was carrying any weapons and he told me no. I then asked him if he was carrying any--if there was any alcohol in the vehicle, he said that he did not drink. I recall both answers were quite quick. And then I asked him if there were any drugs in the vehicle, he paused for, you know, probably two or three seconds, and then told me no. I then asked him if it would be okay if I looked in the vehicle, search the vehicle, and he said go ahead.
>
> Q. Now, did you ask if you could look in the vehicle, or did you ask if you could search the vehicle.

A. Well, according to this [his report], I said--I asked if I could look in the vehicle.

Q. So, it was "look in the vehicle"?

You didn't ask if you could open anything inside the vehicle or anything else, did you?

A. No. I just asked if I could look in the vehicle.

Q. And what happened then?

A. Mr. Marshall just told me, you know, he said go right ahead. He got out, gathered up his papers and we walked up to the front of the vehicle, and he had to open the passenger door, as I recall.

. . . .

Q. And how did you get in the trunk?

A. I asked him, I said--asked him if he had the key to the trunk and he says yes, and I says--and I asked him if he's [sic] open it, which he did, he tried. He was extremely nervous at the time. I--

Q. So did you open the trunk?

A. No, sir, I did not. He--he could not--there was a little latch over the key hole. He was shaking so hard, he couldn't even hold the latch open, so I held the latch up for him so he could insert the key.

Q. And what was inside the trunk?

A. There were four suitcases.

Q. Did you ask if you could look in those suitcases?

A. Uh huh (affirmative). First of all, I asked him what was in the suitcases, and he told me, right quickly, clothes. Then when I looked at him again, he told me that he didn't know where they came from, they must have been in there when he rented the car.

Q. At that point, you opened the suitcases?

A. Couldn't open them, they were padlocked shut.

Q. So, you broke the lock?

A. No. I--one part could zip open a little ways, and I opened it--or unzipped it, far enough where I could see the contents of one bag.

Q. And you didn't ask permission to look inside the suitcases, did you?

A. I don't recall if I asked specifically to look inside those, no.

Q. So, to look inside the suitcases, you were based on the permission to look inside the vehicle; is that correct?

A. Well, I retract that. His first response was clothes when I asked him what it was, and then I asked him if I could look in the suitcases, and he told me, well, they're not mine, they must have been in the trunk when I rented the car. So, yes, he did say they weren't his.

Q. If they weren't his, how come you charged him with the crime?

A. He told me they weren't his, that's what he said. He said go--when I asked--

Q. But you didn't ever get permission from him to search the suitcases, did you? And at that point, you had them out of the vehicle; is that correct?

A. Uh huh (affirmative). I took one out.

Q. And it was locked?

A. Uh huh (affirmative).

Q. And you had to work around the lock to look inside?

A. Well, there was a little play in it, enough where you could see inside.

Q. And to look inside the suitcase, you were basing the permission to look inside the vehicle?

A. Yes.

Mr. Marshall contends that Trooper Avery's request to "look in the car" did not constitute a request to search the vehicle. We disagree. Mr. Marshall gave his consent, although not precisely phrased as consent "to search," then stood by while the trooper searched the passenger compartment of the vehicle. "Failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of consent." United States v. Espinoza, 782 F.2d 888, 892 (10th Cir. 1986); see also United States v. Corral-Corral, 702 F. Supp. 1539, 1544 (D. Wyo. 1988).

Because of our holding, we need not reach the more difficult issue of whether Mr. Marshall's opening the trunk constituted implied consent to search the trunk under the totality of the circumstances presented. See United States v. Almand, 565 F.2d 927, 930 (5th Cir.), cert. denied, 439 U.S. 824 (1978) (voluntary consent found where defendant silently reached into his pocket, removed key, then unlocked and opened camper door).

Mr. Marshall did not consent to Trooper Avery's search of the locked suitcases. The state does not argue that Mr. Marshall's consent to search the trunk should be construed to include locked suitcases found in the trunk.[8] Rather, the state argues that his disclaimer of ownership of the suitcases should be construed to validate the search. We agree that Mr. Marshall made a somewhat ambiguous disclaimer of ownership of the four suitcases found in the trunk of the vehicle, but he did not give his consent to their search.[9] The state has not referred us to any case where a disclaimer of ownership has been held to be a voluntary consent to search. The cases approving the subsequent search of a suitcase after disclaimer of ownership have all turned on the threshold issue of standing or abandonment, not

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8. See State v. Cole, 31 Wash. App. 501, 643 P.2d 675 (1982), where the defendant gave permission to search his hatchback vehicle, but did not give consent to search the suitcases found in the vehicle. Id. at 678. The court held that the consent to search the vehicle did not encompassed the suitcases. Id.

9. Trooper Avery believed that Mr. Marshall's denial of ownership of the suitcases validated the search. He did what our case law has instructed and the defect in the search was not as a result of his actions, but rather those of the prosecutor in failing to properly raise the issue of standing.

consent.[10] We refuse to rely on this authority as it would allow the state to circumvent the teachings of State v. Schlosser, 774 P.2d 1132 (Utah 1989), and allow the state to raise the issue of fourth amendment standing for the first time on appeal by way of the back door.

In summary, we reverse the trial court's denial of the motion to suppress as Mr. Marshall did not consent-in-fact[11] to the search of the locked suitcases found in the trunk of his vehicle.

Judith M. Billings, Judge

WE CONCUR:

Richard C. Davidson, Judge

Norman H. Jackson, Judge

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10. See United States v. Williams, 538 F.2d 549, 550-51 (4th Cir. 1976) (court found abandonment and held cases properly seized when defendant denied ownership of certain cases found in his motel room and allowed the search of the cases); United States v. Colbert, 474 F.2d 174, 177 (5th Cir. 1973) (court found abandonment when defendants disclaimed ownership of suitcases and began to walk away from them).

11. We do not reach the issue of the voluntariness of Mr. Marshall's consent to the search of the car, the trunk, or the suitcases because we find there was no consent-in-fact to the search of the suitcases. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (analysis of voluntariness of consent); State v. Sierra, 754 P.2d 972, 980-81 (Utah Ct. App. 1988) (state did not sustain its burden to prove defendant's consent was voluntary).

ADDENDUM C

Original

IN THE FOURTH JUDICIAL DISTRICT COURT,
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH	)	
	)	
Plaintiff,	)	
vs.	)	No. 296-D
	)	
	)	(Hearing)
JESUS SEPULVEDA	)	
	)	
	)	
Defendant,	)	
	)	

Taken at Provo, Utah
Utah County Court House
Wednesday, October 3, 1990

Before the Honorable: George E. Ballif

Appearances:

For the Plaintiff: Don Eyre
125 No. Main
Nephi, Utah 84648
Telephone:623-1141

For the Defendant: Milton Harmon
36 So. Main
Nephi, Utah 84648

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P R O C E E D I N G S

THE COURT: The law stipulated that we can hear this in Utah County for Millard County -- no, Juab County. I told you wrong. In any event, that was the understanding.

Are you ready to proceed, Mr. Eyre, for the State?

MR. EYRE: We are, your Honor.

THE COURT: And Mr. Harmon?

MR. HARMON: I'm prepared in the absence of my client. For the record, your Honor, I should note that he called in the office after the last continuance, and was advised of the continuance, then he called in after that and gave me a new mailing address in Salt Lake City. A copy of the order stating the hearing for today was mailed to him at that address, together with a letter advising him to be here today. Those letters did not come back, but I've had no contact with him.

THE COURT: And he was directed to be here at 1:30, and it's now 2 p.m.?

MR. HARMON: Yes.

THE COURT: All right. I take it that you want to proceed, Mr. Eyre?

MR. EYRE: That is correct.

THE COURT: And the matter we're proceeding with is State of Utah versus Jesus A. Sepulveda. This is a motion to suppress, so go right ahead.

MR. EYRE: Call Paul Mangelson to the stand.

PAUL MANGELSON

being first duly sworn, was deposed and testified as follows:

DIRECT EXAMINATION

BY MR. EYRE:

Q. Your name is Paul Mangelson?

A. Yes, it is.

Q. And you're a Sergeant for the Utah Highway Patrol?

A. Yes, I am.

Q. How many years have you been employed with the highway patrol?

A. Just about 24.

Q. Would you relate to the Court the training and experience you've had with respect to drug law enforcement and drug identification.

A. I originally attended the Camp Williams Police Academy in 1967. At that particular time we studied drugs. We burned some marijuana in class, seen what it smelled like, looked at it through a

microscope.

Since that time I've been to quite a few in-service training schools; one by New Mexico, one by new Jersey, one by Louisianna.

I'm involved in the Utah Highway Patrol training of criminal interdiction I've been on the job for those 23-and-a-half years and came in contact with drugs on thousands of occasions.

Q. Referring you now to January 30th of this year, were you on duty within Juab County on that date?

A. I was.

Q. On that date did you have occasion to come in contact with the defendant Jesus A. Sepulveda?

A. I did.

Q. Where did that contact take place?

A. It occurred on the northbound lanes of I-15 at approximately milepost 221 which is just a little bit south of Nephi.

Q. Did you observe a motor vehicle in which Mr. Sepulveda was an occupant?

A. I did.

Q. Were you mobile or stationary at the time of that initial observation?

A. I believe at the initial observation I was

stationary.

Q. Describe what you observed on that occasion.

A. The vehicle had came by me, and I pulled out, caught up with the vehicle, noticed that it had expired registration, and stopped the vehicle for that reason.

Q. Describe the vehicle for the Court.

A. The vehicle was a red Camero It had a Utah plate on it, and the plate had expired in December of '89, and we was into January of '90 then.

Q. Do you on a routine basis stop people for expired registrations?

A. Yes.

Q. And issue them citations for that offense?

A. Yes.

Q. What time of day was this; do you recall?

A. This was around 10 O'clock in the morning.

Q. And how did you stop the vehicle?

A. By the use of a red spotlight.

Q. Upon stopping the vehicle, did you come in contact with the driver of the vehicle?

A. I did.

Q. Who was the driver?

A. The driver was Jesus A. Sepulveda.

Q. Were there any other passengers in the vehicle?

A. Yes, there was.

Q. Where were they located?

A. The passenger in the front was Barbara Gallegos. There was a passenger in the rear, a juvenile by the name of Jose Santos.

Q. Upon stopping the vehicle and coming in contact with the driver, what did you initially do?

A. I asked for driver's license and registration, and advised the driver why I'd stopped him.

Q. And was he able to produce either one?

A. He gave me a temporary California license that wasn't valid, and he didn't have a registration.

Q. Did you make an inquiry as to how he came into possession of this particular vehicle?

A. I did. He stated the car belonged to a friend in California. He said that they had gone to California on Friday night in a pick-up truck, and it had broke down, down in California, and they'd got this car from a friend down there.

Q. Was he able to tell you the name or the

address of this friend?

A. No, he couldn't. I asked him that. I asked him if he'd give me the name of the friend and the address, and he couldn't do either one.

Q. And there was no registration in the vehicle?

A. There was not.

Q. Did he have any permission slip or any written authorization that he was in possession of the vehicle?

A. No, he didn't. He had nothing.

Q. After you'd obtained this information from the driver, what then did you do?

A. I talked to the one occupant. I asked her for ID. She explained that she was a friend of the driver and that she had just gone along to California on this trip just for the ride. The rear passenger was 16 years old, and he was a friend of the driver's. Both had the same address in California, also. Yet they were coming back to Utah, and they really couldn't give me a reason why they was even coming back to Utah.

Q. You made an inquiry of that?

A. I did.

Q. And they didn't have a reason?

A. No.

Q. With respect to driver Jesus Sepulveda, does he speak English?

A. He spoke fairly good English, yes. Anytime he had a problem understanding anything I said, the girl would interpret for him, which was very seldom.

Q. After you made the inquiry of the two passengers, what then did you do?

A. An observation that I'd made during all this time I was talking, that the more I talked and the more I asked him questions about the car and why he was coming back to Utah, he became extremely nervous, obviously nervous. His hands were visibly shaking, and it was obvious to me that he was extremely nervous.

Q. And after you've made those observations, you didn't make any other observations to the interior of the vehicle or --

A. The interior was quite cluttered up, and it appeared that they'd been living in the car. Other than that, no other observations.

Q. And what then did you do?

A. I asked him why he was so nervous; if he had contraband in his car that he was afraid I was

going to find. He said no. Then I asked if I could search the car for this -- guns or alcohol or drugs, and he said, "Go ahead."

Q. Was he still in the vehicle when you had this conversation?

A. Yes, everyone was still in the vehicle.

Q. And after he gave you consent to search the vehicle, what then did you do?

A. I had all three of the occupants exit the vehicle. I checked the two male individuals for weapons, patted them down. In doing so, on the passenger in the rear I found a small marijuana pipe or a small smoking device in the passenger's back pocket.

Q. Did he give any explanation for that?

A. Yeah, he said he'd found it on the streets in Los Angeles.

Q. After you found those -- that particular item, what then did you do?

A. I proceeded to search the vehicle. I asked about the trunk, and he said he didn't have the key for the trunk. He said he could open it with a screwdriver. He got a screwdriver out and opened the trunk.

Q. He did that himself?

A. He did that himself, yes. He actually broke the lock on the trunk to open it for me. I mean, he was that intent on showing me that there was nothing there. I felt like he was really -- this was a rouse, you know, just to show me that he had nothing. I did check the trunk and there was nothing there. Just to go along with him, after he'd broke the trunk open. I then proceeded to check the interior. I felt the seats. I've checked Cameros on quite a few occasions and I know where there's a -- that there's a pretty good hiding place in the back of he seats.

Q. Have you found contraband concealed in those compartments in the bucket seats on other occasions in Cameros?

A. Yes, I have.

Q. How many times?

A. Oh, several times.

Q. After you felt them, did you make any other examination of the screws on the seats?

A. I did. Generally you can just squeeze the seats together, and if there's anything in there you can usually feel it. I could not feel anything on this occasion, but I noticed the screws -- there's two screws at the bottom that hold a

plastic backing on the seats, and I noticed that these screws were marked up, indicating that they'd been taken in and out on several occasions. So, I decided to go ahead and remove them and take a look.

Q. And did you retrieve a screwdriver from your vehicle or --

A. I don't remember for sure, but I did get a Phillips screwdriver, and I removed the two screws, and inside were two Reynolds wrapped packages that contained white material -- aluminum foil is what I'm trying to say.

Q. I show you what's been marked as State's Exhibit No. 1 and ask if you've seen those items?

A. Yes, I have.

Q. What are they?

A. Those are the two items that were removed from the back seat, also the pipe that was removed from the young boy's back pocket.

Q. I show you what's been marked as State's Exhibit No. 3, a photograph, and ask if you've seen that photograph before?

A. Yes, I have.

Q. Do you know what it depicts?

A. This depicts the back seat of the Camero

after I'd taken the two screws out of the bottom and raised up the plastic backing.

THE COURT: Could I interrupt you. I've got a jury that's ready to come back. If I could get you to just kind of move back, and could you step down, Officer Mangelson. It won't be but maybe 10 or 15 minutes. If you want to go out in the hall or what have you, you may, or you may stay in the courtroom. It will take us a few minutes, I think, to get the -- everybody here.

(Hearing recessed then resumed after interruption)

Q. BY MR. EYRE: Sergeant Mangelson, at this time I show you what's been marked as State's Exhibit No. 2 and ask if you know what that depicts?

A. Yes. This depicts the back-end of the Camero showing the Utah plate that has an expired decal on it.

Q. After you found the two aluminum foil wrapped packages in the seat, what then did you do?

A. Arrested all three individuals for possession of a controlled substance, told them of their Miranda rights, and proceeded to take pictures of the car. I called for some backup also.

Q. Did you conduct an inventory search of the vehicle?

A. Yes, I did.

Q. Did you find any other contraband pursuant to that search?

A. The only other contraband that was found was a very small amount of marijuana.

Q. I show you State's Exhibit No. 1 again, and indicate to you a tissue contained in that also. Did you find that at that time?

A. I did.

Q. Where was it located?

A. It was located in the front part of the vehicle, and had a small amount of white powder on it that appeared to be cocaine.

Q. At the time of the arrest of these individuals, did you seize the items contained in State's Exhibit No. 1?

A. Yes, I did.

Q. And then you had them in your sole control and possession since that time?

A. Yes, except for the times they were at the crime lab.

Q. You've had the items in Exhibit 1 analyzed at the crime lab; is that correct?

A. Yes, I have.

Q. I show you what's been marked as State's Exhibit No. 4 and ask you if you've seen that before?

A. Yes, I have.

Q. What is it?

A. This is the analysis results from the crime lab.

Q. For the items contained in State's Exhibit No. 1?

A. Yes.

MR. EYRE: I have no further questions.

THE COURT: Mr. Harmon?

CROSS EXAMINATION

BY MR. HARMON:

Q. Officer Mangleson, you indicated that you were on I-15 by milepost 221. This red Camero comes by you, and you pulled out and followed it. Could you tell us why you decided to follow the car?

A. The occupants appeared to be very young to me, as they come by me. I simply pulled out to take a second look at them.

Q. Were they all hispanic?

A. Yes, they were.

Q. In your drug interdiction work, do you have a loose profile that you use?

A. Do we have a what?

Q. A loose profile.

A. I guess you could call it that.

Q. Could you tell us what things would fit in that profile?

A. Well, there have been a lot of hispanics that have been picked up hauling narcotics.

Q. Has a Camero-type automobile been one of the favorite-type vehicles?

A. We've picked up a lot of Cameros, yes. I think we've picked up about every kind of -- every other kind of vehicle also.

Q. And are they generally traveling northbound as this vehicle was going?

A. Well, we've caught them going both ways, but as a rule, drugs go north and money goes south.

Q. You have had prior experience with Camero-type vehicles hauling narcotics, apparently, in various compartments that can be opened up in those cars?

A. That's correct.

Q. You indicated that as you stopped the defendant, he showed you a temporary California

license. What was it that made that not valid?

A. It was a temporary instruction permit, and it was valid for a certain number of days. He had to be accompanied by a California licensed driver 18 years or older to make this license valid.

Q. And did anyone else in the car have a valid California driver's license?

A. No, they did not.

Q. Okay. Did you check on that with each of the other persons?

A. I did.

Q. Okay. Were there any of them that were over 21 years of age?

A. Yes.

Q. Who was that?

A. Miss Gallegos was.

Q. Okay. You indicated that there was no registration in the vehicle, but it was a Utah licensed car; is that right?

A. Yes, it was.

Q. Were you able to check through your radio on the registration on the car to find out if it had a valid registration somewhere?

A. As I recall, this vehicle was registered to a Mary Espinoza from the Salt Lake area, if I

recall.

Q. Was there any attempt made to contact her to find out if the car had been stolen or anything like that?

A. There had been no report on the car as stolen.

Q. As you talked with Mr. Sepulveda, did he speak to you in Spanish mostly?

A. No, he spoke mostly English.

Q. Okay. There were occasions when you had to have Miss Gallegos do some interpreting for you; is that right?

A. There was, yes.

Q. Were you able to detect what it was that they were saying to each other when they spoke in Spanish?

A. No.

Q. Did some of that interpreting go on at the time when you talked with them about examining the interior of the car?

A. I don't recall exactly which times it was. The main times, though, I checked with her to make sure that he understood.

Q. And was there also a use of her as an interpreter when you asked them to get out of the

car?

A. I don't recall that.

Q. How about when you asked them to open the trunk of the car?

A. I don't recall that either.

Q. Is it possible that as you had them open the trunk, that you provided him the screwdriver out of your car?

A. That is possible, yes.

Q. And so, he would have been opening the trunk at your direction with your screwdriver?

A. Basically. I asked him to open the trunk and he had to break into it.

Q. How was he dressed?

A. To tell you the truth, I don't remember. I don't believe I have a record of it.

Q. Is it possible that he was there without a coat on?

A. That's possible, yes.

Q. Maybe even been in a T-shirt or something like that?

A. That is possible.

Q. And do you recall what the weather was like on this day?

A. I don't have a record of it, but I would

imagine it was cool, being in January.

Q. Was there any detectable odor of marijuana about the vehicle?

A. I don't recall any, no.

Q. Now, you've indicated that you did an inventory search of the vehicle and you found a small amount of marijuana. Where was that located?

A. Located on the rear floor in a piece of aluminum foil.

Q. Then you found a tissue with some cocaine residue, or what appeared to be cocaine in it?

A. That's correct.

Q. Where was that located?

A. In the front part of the vehicle.

Q. Do you remember if it was by the dashboard or on the seat?

A. As I recall, it was on the dashboard.

Q. Did you have to open the tissue up in order to see the contents?

A. Yes.

Q. The marijuana that was in the back, was that -- did you have to open the aluminum foil up in order to see that?

A. Yes, you did.

Q. Apparently, from your training and

experience, if there had been marijuana recently smoked in the vehicle, you would have detected that; is that right?

A. I would think so, yes.

Q. And when I say "recently," that may be within the last five or six days?

A. Yes.

MR. HARMON: I think that's all I have, your Honor.

THE COURT: Mr. Eyre, anything further?

MR. EYRE: A couple last questions.

RE-DIRECT EXAMINATION

BY MR. EYRE:

Q. Sergeant Mangelson, with respect to ownership of the vehicle, did you check -- run a computer check on that vehicle before or after the arrest of the individuals?

A. It was after.

Q. So, you had no knowledge as to whether it was stolen or not prior to the arrest of the individuals; is that correct?

A. No, I didn't.

Q. And at that time you had no knowledge whether they were in rightful possession of the vehicle or not; is that correct?

A. No, I did not.

Q. After the arrest of the individuals, did you have any conversation with the passenger Barbara Gallegos?

A. I did.

Q. What did she say and what did you say at that time?

A. She handed -- do we want this part of the record?

Q. Yes.

A. She handed me a note with a phone number on it, and told me to call that number and tell the individual who I had stopped. I said, "Who are you?" She told me that she was an undercover agent for DEA, and that she had gone to California with this individual. She had gained his confidence, and she was quite certain that there was narcotics in the car, but that she didn't know where they were.

At that point I didn't know whether she was pulling my leg or what the circumstances was. So, I still just considered her a -- basically the same as anybody else in the car.

Later on I did confirm that what she had told me was true.

Q. That she was assisting the DEA in an investigation; is that correct?

A. That's correct.

MR. EYRE: Nothing further.

THE COURT: Anything on that, Mr. Harmon?

RE-CROSS EXAMINATION

BY MR. HARMON:

Q. In relationship to the time when you opened up the back seat of the car, when was it that you had the conversation with Miss Gallegos?

A. Prior to that.

Q. Was it prior to the time when you'd seen the screws on the back seat that appeared as if they'd been turned with a screwdriver?

A. I believe that I had noticed them prior to that.

MR. HARMON: That's all I have, your Honor.

MR. EYRE: Nothing further.

THE COURT: You can step down. Thank you.

MR. EYRE: We would offer the exhibits, your Honor.

THE COURT: They'll be received.

MR. HARMON: No objection for the purpose of saving time.

MR. EYRE: Do you want to examine them?

THE COURT: I assume they're what you represent them to be.

MR. HARMON: I don't suppose we'd want the Court confirming that the cocaine isn't cocaine by way of testimony.

THE COURT: Yeah, I'm not competent to do that.

Okay, do you have anything else that you want to present? I guess there isn't much that you can, huh?

MR. HARMON: No, your Honor. I do have a memorandum that I've prepared and I'll put the addition -- the facts in it from this day's hearing and deliver it to the Court Tuesday?

THE COURT: Okay. Do you want to send yours in at the appropriate time?

MR. HARMON: Okay. Ten days after that?

THE COURT: Fine; and you'll have how long?

MR. EYRE: I'll have it to the Court Tuesday.

THE COURT: Okay. So, ten days after you receive yours. All right, fine. Thank you. I'll take it under advisement, then. Wait for the memorandum and we'll be in recess.

(Court in recess)

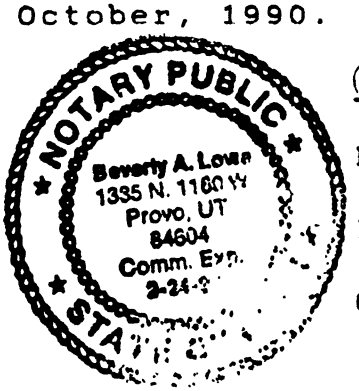
STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly A. Lowe, Certified Shorthand Reporter and Notary Public for the State of Utah, cerify:

That I am an official court reporter in the Fourth Judicial District Court of the State of Utah;

That I was present during the entire proceedings in the before entitled cause; that the proceedings were reported stenographically by me, and were therafter transcribed; that said transript constitutes to the best of my ability, a true and complete record of the proceedings had.

IN WITNESS THEREOF, I have subscribed my name and affixed my seal this 17TH day of October, 1990.



Beverly A. Lowe, CSR/RPR
NOTARY PUBLIC IN AND FOR THE
COUNTY OF UTAH, STATE OF UTAH

My Commission expires: 2-24-92

ADDENDUM D

IN THE FOURTH JUDICIAL DISTRICT COURT

JUAB COUNTY, STATE OF UTAH

****

STATE OF UTAH,

Plaintiff,

vs.

JESUS A. SEPULVEDA,

Defendant.

Case Number: 296-D

DECISION

GEORGE E. BALLIF, JUDGE

****

The motion of the defendant to suppress evidence obtained from a vehicle driven by the defendant which was stopped by Trooper Mangelson near Nephi, Juab County, Utah, came before the Court for hearing on October 3, 1990, by stipulation of counsel, the defendant having heretofore waived his rights to a speedy trial.

The State presented its evidence through Trooper Mangelson, with certain stipulations as to the contraband found in the vehicle driven by the defendant identifying it as one kilo of cocaine. The Trooper gave the only testimony presented at the hearing with reference to the circumstances of the stop, the warrant less search of the vehicle, and all other surrounding facts and circumstances observed and participated in by the Trooper and defendant and those in the vehicle driven by the defendant.

From the testimony given it appears that the following facts are those testified to by the Trooper and not contested by any other witness since no one else was called by the State or the defendant.

Trooper Mangelson testified that he first observed the defendant vehicle which was a Camaro (a stylish General Motor sports car) but that it had an expired Utah registration. Upon effecting the stop the officer asked the defendant for a driver's license and registration which the defendant was unable to produce. The defendant claimed the vehicle belonged to his friend and was being used to return to Utah since the vehicle they went to California in broke down. The defendant could not give a name of his friend who owed the vehicle nor an address.

The officer noted that as the conversation with defendant extended he observed the defendant reacting in a very nervous and visibly shaking manner. After being asked if the vehicle was carrying any drugs or firearms and responding no, the trooper asked if he could search the vehicle to which he said go ahead.

The officer requested the passengers to exit the vehicle at which time they did and he frisked them for weapons, and found a small marijuana pipe in the pocket of a juvenile who was a passenger in the vehicle. The defendant did not have a key to the trunk but got access to it for the search through use of a screw driver. While searching the vehicle the officer noted screws that had paint wear marks on them indicating some form of recent use

and lead to the discovery of a compartment under the seat wherein one kilo of cocaine was retrieved.

It is also noted that the testimony presented by the trooper was to the effect that a women passenger in the subject vehicle had taken the trooper aside and indicated to him that she was an agent for the D.E.A. and that there was contraband in the car after which the officer proceeded to the discovery through the compartment under the seat to which access was obtained through use of the screwdriver on the wore screws.

The two paramounts considerations that this set of facts give rise to are whether or not there was probable cause for the stop of the vehicle, and a subsequent search of it. There is also an issue to whether or not the defendant under the circumstances of this case had any standing to object to the officer searching the vehicle aside from the probable cause question, and lastly whether or not a consent was obtained to search the vehicle by the trooper from the defendant.

The Court concludes that the facts in this case support the right of the trooper to proceed with a search of the vehicle under all of the above issues.

As to the initial stop of the vehicle, the only testimony presented indicates that there was no valid Utah registration presented for the car which showed a violation of the registration laws which justified the officer in making the stop which would not be unreasonable under the circumstances of the expired

registration observed by the officer. The fact that after the stop the defendant could not produce a drivers license nor could he give any ownership information other than that it was a friends car whose name he could not give nor whose address he could give would justify the officer in proceeding with additional questions which the uncontraverted testimony shows that consent was given for the vehicle search and no evidence would support a showing of the consent being coerced or in any manner otherwise unlawfully obtained.

It would appear that the totality of circumstances after the initial stop and learning from a third party in the vehicle who was identified as a D.E.A. operative was a direct statement to the officer that there was contraband in the vehicle which occurred prior to obtaining the consent or at least proceeding with the search would certainly give probable cause under exigent circumstances, the detention being on a highway some distance from a source for obtaining a search warrant would certainly give probable cause to the officer to proceed. The fact that the consent was given would clearly confirm the actions of the officer in going into areas that he deemed suspicious within the car in locating the contraband.

Based on the foregoing analysis on the basis of evidence presented only by the trooper, there has been no showing that the search was unreasonable, and to the contrary it appears that the records shows it to be a reasonable search under the circumstances

presented by this case.

Defendant's motion to suppress is denied, trial in this matter is set for the 29th day of January 1991, at 10:00 a.m. o'clock or the follow the regular law and motion calendar in Nephi, Utah.

Dated this 6 day of ~~November~~ December, 1990.

BY THE COURT

GEORGE E. BALLIF, JUDGE

cc: counsel